

1 THE HONORABLE RICHARD A. JONES
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6 **UNITED STATES DISTRICT COURT**
 7 **WESTERN DISTRICT OF WASHINGTON**
 8 **AT SEATTLE**

<p>9 SWINOMISH INDIAN TRIBAL COMMUNITY, 10 Plaintiff, 11 vs. 12 SKAGIT COUNTY DIKE DISTRICT NO. 22, 13 BOARD OF COMMISSIONERS OF SKAGIT 14 COUNTY DIKE DISTRICT NO. 22, STANLEY E. NELSON, NOLAN LEE, CURTIS B. WYLIE, ROBERT A. HUGHES, AND DAVID HUGHES, 15 Defendants.</p>	<p>No.: C07-1348 PLAINTIFF'S REPORT ON EXPENDITURE OF CONSENT DECREE SETTLEMENT FUNDS</p>
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16 WHEREAS Plaintiff Swinomish Indian Tribal Community ("Tribe") brought this action
 17 against Defendants Skagit County Dike District No. 22, Board of Commissioners of Skagit
 18 County Dike District No. 22, Stanley E. Nelson, Nolan Lee, whose seat on the Commission is
 19 now filled by Greg Lee, Curtis B. Wylie, whose seat on the Commission is now filled by John
 20 Wolden, Robert A. Hughes, and David Hughes (collectively, "District") in October 2007,
 21 alleging violations of the federal Endangered Species Act ("ESA") and Clean Water Act
 22 ("CWA") related to certain of the Defendants' actions in replacing and maintaining tidegates and
 23 other drainage infrastructure within its jurisdiction;

1 WHEREAS the Tribe moved for partial summary judgment on its CWA claims related to
2 the replacement of the Dry Slough, Wylie, and Eakins tidegates, and ESA claims related to the
3 replacement of the Dry Slough tidegate, and the Defendants moved for partial summary
4 judgment on the Tribe's claims related to the Wylie and Eakins tidegates;

5 WHEREAS this Court granted summary judgment to the Tribe in full on its motion
6 for partial summary judgment and denied the Defendants' motion for partial summary
7 judgment;

8 WHEREAS the Tribe requested that the Court defer granting a remedy to the Tribe
9 for the adjudicated violations of the ESA and CWA pending an opportunity to negotiate a
10 settlement regarding remedy;

12 WHEREAS the parties negotiated in good faith in an attempt to resolve the remedy issues
13 for the violations of law identified by the Court in its September 5, 2008 Order, and moved this
14 Court to adopt a Consent Decree obligating the parties to undertake certain actions within
15 specific deadlines;

16 WHEREAS after the parties negotiated minor modifications to the Consent Decree and
17 this Court approved such modifications, this Court entered an order approving the Amended
18 Consent Decree on January 29, 2009;

20 WHEREAS the Amended Consent Decree set forth a deadline of 18 months for issuance
21 of permits for construction of a Goose Reserve Restoration Project, and despite this deadline, no
22 permits were issued in the three and a half years following execution of the Amended Consent
23 Decree;

1 WHEREAS the Amended Consent Decree articulated an alternative remedy if permits for
2 construction of the Goose Reserve Restoration Project were not issued within the 18-month
3 deadline, namely the installation of a self-regulating tidegate at Dry Slough;

4 WHEREAS the parties have agreed that installation of a self-regulating tidegate at Dry
5 Slough is no longer a suitable remedy for the District's violations of the CWA and ESA;

6 WHEREAS the parties negotiated in good faith to amend the obligations undertaken
7 in the Amended Consent Decree and identified alternative obligations that resolve the legal
8 issues identified by this Court, and submitted to the Court a [Proposed] Second Amended
9 Consent Decree;

10 WHEREAS the Court entered an order approving the Second Amended Consent Decree
11 on October 15, 2012;

12 WHEREAS the Second Amended Consent Decree required the Defendants to pay to the
13 Plaintiff the sum of \$500,000 for the express and sole purpose of implementing actions that
14 promote the recovery goals established in the federally-adopted Endangered Species Act
15 Recovery Plan for Puget Sound Chinook salmon;

16 WHEREAS the Second Amended Consent Decree also required the Plaintiff to submit an
17 annual report on the use of these funds to the Court, the United States Department of Justice, and
18 Defendants describing the activities for which funds were used in support of the goals of the
19 Recovery Plan, and the amounts expended for each activity, until such time as the Consent
20 Decree funds are fully expended;

21 NOW, THEREFORE, Plaintiff SWINOMISH INDIAN TRIBAL COMMUNITY submits
22 the following report:

To date, the Tribe has received four payments of \$125,000 each from the Defendants, for a total of \$500,000. Funding may support projects that “promote the recovery goals established in the federally-adopted Endangered Species Act Recovery Plan for Puget Sound Chinook salmon.” Second Amended Consent Decree at 4. All projects have advanced the Recovery Plan’s goals. Since its previous Report, the Tribe completed one project with Consent Decree funds:

McGlinn jetty emergency response-SRSC Technical Support: In April 2023, it was discovered that juvenile salmon, including ESA-listed Chinook, were being harmed because of stranding and entrainment on the McGlinn Island jetty. The Swinomish Tribe worked with the U.S. Army Corps of Engineers to implement an emergency repair that consisted of placing a graded mix of sand and gravel along approximately 200 feet of the jetty with the goal of reducing velocities through the porous structure to reduce the risk of fish entrainment. Skagit River System Cooperative (“SRSC”) provided technical support for this effort, including monitoring plan development and implementation, construction planning and coordination, development of adaptive management targets to limit fish entrainment, fish exclusion and effectiveness evaluation, and regular velocity measurements. The Tribe completed the majority of the above-described tasks within the 2023 reporting period. The Tribe expended \$94,104.78 for SRSC’s work to guide habitat restoration for Chinook salmon at the McGlinn Jetty in 2023, and spent another \$5,895.22 in the current reporting period. This project is now complete.

The funds expended on and committed to the McGlinn Island jetty project, as well as previously reported projects completed in prior reporting periods, advanced the goals of the Recovery Plan for Puget Sound Chinook salmon. Consistent with the requirements of the Second Amended Consent Decree, these projects support the Plan’s recommendations to “protect, restore, evaluate, and monitor habitat condition for Skagit Chinook salmon.” Second Amended Consent Decree at 4. The Court further provided examples of suitable projects for which

1 settlement funding may be used, including “evaluating fish passage blockages and implementing
 2 restoration actions”, “evaluating sources of instream pollution and implementing plans to reduce
 3 it”, and “planning and implementing research projects on estuary survival and limiting factors.”

4 *Id.* The expenditures reported here are consistent with these examples and the Recovery Plan.

5 Respectfully submitted this 2nd day of October 2024.

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16 17 CERTIFICATE OF SERVICE

18 I hereby certify that on October 2, 2024, I electronically filed the foregoing *Plaintiff's*
 19 *Report on Expenditure of Consent Decree Settlement Funds* with the Clerk of the Court using the
 20 CM/ECF system, which will send notification of this filing to the attorneys of record and all
 21 registered participants.

22 s/ Weston LeMay
 23 Weston R. LeMay
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